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NOTE

State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law

by
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and
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United States extradition treaties have long contained clauses which exempt from extradition those accused or convicted of political offenses. Traditionally, the courts have determined the applicability of the exemption in particular cases. A number of factors have complicated the courts' task, however. International terrorism is very much in vogue. Individuals and political groups increasingly employ violence to meet their political goals. As a result, the courts have had to determine the amount of violence society will tolerate in order to effectuate the political crimes exemption.

The judicial balancing of these competing concerns has induced criticism of the court's ability to administer the exemption. A number of recent decisions, in which political offenders were withheld from close U.S. allies, has fueled criticism that the courts are unsuited to apply the politically oriented analysis that application of the exemption requires. A proposal has emerged that would strip the courts of jurisdiction to administer the exemption and vest jurisdiction exclusively in the Department of State. This proposal has the support of both the Justice and the State Departments, and has already become a part of three treaties to which the United States is a party. While the Senate has recently rejected the proposal, choosing to retain jurisdiction in the courts, the proposal re-

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mains a subject of controversy and an issue having important effects on the administration of the extradition laws.

This note will delineate the current status of the political offense exception by examining (1) its historical justifications, (2) its procedural setting, (3) the legal definition of political offense and (4) the recent case law. The note will then evaluate the efficacy and desirability of the present and proposed methods of administering the political offense exemption and argue that the Senate was correct in abandoning its original proposal to vest exclusive jurisdiction over the political offense exception in the State Department.

II. BACKGROUND

A. *The Historical Justifications for the Political Offense Exception*

Until the late 18th century, extradition was used primarily against political and religious offenders.¹ At that time, political opponents and religious heretics were viewed as a threat to all nations,² while common criminals were not.³ By the 19th century, the advances in transportation accompanying the industrial revolution allowed common criminals to flee to and threaten other jurisdictions.⁴ At the same time, the rise of political liberalism fostered tolerance of political non-conformists.⁵ Due to these factors, extradition ceased to be a means of international political repression and became a method of international crime control. Accordingly, the political offense exception was introduced into the law of extradition.⁶

The historical justifications for the political offense exception fall into three categories. First, the extradition of political offenders does not serve the mutual interests of the interested states. Common criminals are

¹ J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 303-04 (1891).

² The dominant view of the political order attributed political authority to divine ordination. There was, therefore, a fundamental solidarity of interest among political elites; any opposition against one state threatened all others. *Research in International Law under the Auspices of the Harvard Law School, I. Extradition*, 29 AM. J. INT'L L. 15, 108 (1935) [hereinafter cited as Harvard Research]; 1 L. OPPENHEIM, INTERNATIONAL LAW 635-636 (H. Lauterpacht, ed. 7th ed. Supp. 1948).

³ The physical difficulty of travel and the potent social stigma of exile from one's home usually prevented common criminals from fleeing to other jurisdictions. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 6-7 (1971).

⁴ Harvard Research, *supra* note 2, at 35-37 and 108-109. Common criminals, of course, pose a threat to all societies. 1 L. OPPENHEIM, *supra* note 2, at 636.

⁵ Harvard Research, *supra* note 2, at 108-109. Nations with constitutional liberties, themselves products of revolutions, recognized a fundamental right to rebellion against oppression. Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 372 (1953).

⁶ Garcia-Mora, *supra* note 5, at 372; 1 L. OPPENHEIM, *supra* note 2, at 644.

extradited because they are a threat to all nations⁷ and extradition thus serves the interests of both the requesting and the requested state. In contrast, the authentic political offender is a threat only to his own government, whose existence or form he opposes.⁸ Because the political offender threatens only his home government, the requested state is seen to have no interest in his extradition.⁹

Secondly, political offenders have enjoyed special status in democratic societies. The United States and most western European nations owe their sovereignty and political liberty to popular revolution or constitutional liberalism. As a result, the concept of the legitimate rebellion against oppression is deeply rooted in western society.¹⁰ Nations claiming adherence to such liberal principles are reluctant to be an accomplice in the attempts of a foreign government to persecute its political opponents.¹¹ This reluctance is founded upon loyalty to democratic principles, concern for human rights,¹² and unwillingness to abet the punishment of a revolutionary merely because he had the misfortune to fail.¹³

Finally, the political offense exception is justified on humanitarian and altruistic grounds. If a party in a civil war or revolution honestly fights for his political beliefs and is defeated, it is likely that he will be subjected to summary execution, to physical abuse or, at the very least, to a politically tainted trial.¹⁴ A requested state might be unwilling to deliver the extraditee into such a position.

B. Methods Employed to Administer the Extradition Law

While most extradition treaties provide an exemption for political crimes, few designate the organ of government which will decide whether the exemption is applicable. In most countries, therefore, the extraditee is free to argue that he is a political offender to either the executive or the judiciary. The United States currently subscribes to this practice, although, as mentioned, it has entered into three extradition treaties which

⁷ See *supra* note 2.

⁸ See *supra* note 3.

⁹ PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 160 (1909) [Hereinafter cited as PROCEEDINGS]. This premise is related to the notion that in order to extradite an individual, the offense charged must be an offense in the requested state. Hyde, *Notes on the Extradition Treaties of the United States*, 8 AM. J. INT'L L. 487, 489 (1914).

¹⁰ Kutner, *Due Process of Rebellion*, 7 VAL. U.L. REV. 1, 2-10 (1972).

¹¹ PROCEEDINGS, *supra* note 9, at 146. Of course, adherence to liberal principles of political tolerance often may be little more than a public posture, belied in practice through varied forms of domestic political repression, e.g., the American loyalty oaths of the 1950's.

¹² PROCEEDINGS, *supra* note 9, at 163.

¹³ Hyde, *supra* note 9, at 489.

¹⁴ See Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

make the executive branch the exclusive forum to assert the exemption.

The countries which provide for exclusive executive jurisdiction over the political crimes exemption do so only because they commit their entire extradition procedure to the executive branch.¹⁶ While the prevailing practice among nations is to involve the judiciary in the extradition process, some states do not.¹⁶

1. Executive Method

As its name implies, the executive method runs exclusively within the executive branch of the requested government.¹⁷ The Foreign Minister receives the request, acting as an agent of the President or King, and forwards it to the Minister of Justice.¹⁸ The Minister of Justice's role is to advise the President or King whether the request should be honored.¹⁹ The President or King has final authority and may completely disregard the advice of the Minister of Justice.²⁰

France had the most highly developed executive system of extradition²¹ until it disposed of it in 1927 in favor of a system in which a judicial hearing was required.²² The executive system is still in operation in certain countries, such as Ecuador, Panama, Portugal and the Eastern European countries.²³

2. Judicial Method

The judicial method in its purest form provides for judicial participation in the extradition process.²⁴ Among the states employing the judicial method, the effect given judicial determination varies. In the Anglo-American systems, judicial determinations are "conclusive as to the refusal of extradition and advisory as to concession."²⁵ While judicial participation is required in all events, the executive branch may disregard a

¹⁶ S. BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 136 (1966).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 137.

²² *Id.*

²³ Ecuador Extradition Law of Oct. 8, 1921, art. 51; Panama Extradition Law of Nov. 27, 1930, art. 9; Portugal's extradition law was spelled out in a Portugal-U.S. diplomatic communication. Harvard Research, *supra* note 2, at 183-4 n.57. The Eastern European Countries have generally subscribed to the extradition law of Russia, Laws of Criminal Procedure of the Russian of 1914, art. 852.

²⁴ Under this system no accused can be extradited without a judicial decision, although in many cases this decision can be ignored. S. BEDI, *supra* note 15, at 137.

²⁵ I. SHEARER, *supra* note 3, at 199.

judicial grant of extradition but is bound to enforce a judicial denial of extradition. This system allows the extraditee recourse before the judiciary, and, in the event of an adverse judicial determination, recourse before the executive. The Anglo-American system prevails in, among others, Great Britain and the United States.²⁶

In the Belgian system, judicial participation, while required, is purely advisory.²⁷ Under this system, the executive may make its decision in complete disregard of the judicial determination after obtaining an advisory opinion from the Court of Appeal.²⁸ Systems calling for non-binding judicial determinations are in operation in Mexico and Peru.²⁹

On the other extreme is a system giving conclusive effect to judicial determinations both for and against extradition.³⁰ This system is said to operate in Germany.³¹

C. *U.S. Extradition Process*

1. Procedural Aspects

The United States currently adheres to the judicial method in its mixed form.³² Present federal law requires the requesting state to channel its request through two levels, the executive and the judiciary, and extradition will not be granted without the approval of both branches.³³ Accordingly, the authorized representative of the requesting state must:

- (1) present a requisition to the Department of State in accordance with treaty stipulation, and (2) file a verified complaint in the Federal District Court wherein the (accused) is found charging him or her with an offense under the terms of the treaty stipulations, the procedural laws of the United States and the substantive laws of the state wherein the Federal

²⁶ *Great Britain*: 33 and 34 Vict. c. 52. *United States*: Extradition Act, 18 U.S.C. 3181 (1948).

²⁷ I. SHEARER, *supra* note 3, at 198 n.6.

²⁸ The *chambres des mises en accusation* of the Court of Appeal renders the advisory opinion. *Id.* at 199. As the opinion is not binding, no right of appeal lies against it. *Id.* at 199 n.1.

²⁹ *Mexico*: Law of 3/17/77, arts. 19-22; *Peru*: Law of 10/23/88, art. 12.

³⁰ I. SHEARER, *supra* note 3, at 200.

³¹ Harvard Research, *supra* note 2, at 186. However, this contention is disputed and it is argued that Germany adheres to the Anglo-American system.

³² 18 U.S.C. § 3184. The Supreme Court has interpreted the Fifth Amendment to require that the United States have a treaty with the requesting country before we can extradite an accused to that country. *Valentine v. United States ex rel Neideker*, 299 U.S. 5 (1936) (by implication). International law, generally, does not recognize a right of the demanding state apart from treaty to demand extradition. *Factor v. Laubenheimer*, 290 U.S. 276 (1933); 16 DEP'T ST. BULL. 212 (1947). However, some states have granted extradition in the absence of treaty, as a matter of comity. See I. SHEARER, *supra* note 3, at 27-34.

³³ 18 U.S.C. § 3184.

District Court is located.³⁴

The requisition to the Department of State is considered a formal diplomatic request,³⁵ and a precondition to extradition.³⁶ If the requisition has been filed before the commencement of judicial proceedings³⁷ and has passed inspection by the Department of State,³⁸ the Secretary of State may institute a judicial hearing on the extradition request.³⁹ However, this is not a requirement, and the requesting country may commence judicial proceedings on its own.⁴⁰

Once a complaint is filed in a court of competent jurisdiction,⁴¹ extradition will be granted if the requesting state proves the following:

- (1) that the extraditee is the person whom is sought,⁴²

³⁴ M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND THE WORLD PUBLIC ORDER* 511 (1974).

³⁵ 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 906 (1968) [hereinafter cited as 6 M. WHITEMAN]. The requisition must conform to various substantive requirements specified in the pertinent treaty. The consequences of a defective requisition are mitigated by the liberal amendment policy followed by the Department of State. M. BASSIOUNI, *supra* note 34, at 512. Most treaties contain deadlines after which no requisitions may be filed. Commonly, extradition may not be granted after the expiration of a two-month period beginning when the extraditee is arrested and confined pursuant to an extradition warrant.

³⁶ Normally the requisition is made at the time documentary proofs are submitted in support of extradition. 6 M. WHITEMAN, *supra* note 35, at 905 (1968). However, since under federal law, the requesting state may itself institute extradition proceedings before a federal magistrate, with the authorization of the State Department, the formal requisition can be made after the documentary proofs are submitted but in all events before the Secretary makes his final decision on the request. The pertinent treaty may stipulate a deadline after which the requisition will not be considered.

³⁷ *Id.*

³⁸ M. BASSIOUNI, *supra* note 34, at 512.

³⁹ The Department of Justice, acting on the State Department's behalf, is the complainant in the "overwhelming majority of extradition cases." Memorandum, *infra* note 113 at § 9954. See *contra* 4 HACKWORTH *DIGEST* 93 (1944) and 6 M. WHITEMAN, *supra* note 35, at 916; *Grin v. Shine*, 187 U.S. 181 (1902).

⁴⁰ It is unnecessary that the complaint be filed by a consular or diplomatic officer. However, only authorized representatives of the requesting state may make requests under the treaties. M. WHITEMAN, *supra* note 35, at 935. This requirement has generated judicial inquiry into the authority of the representative making the complaint. See, e.g., *United States ex rel. Caputo v. Kelley*, 92 F.2d 603 (2d Cir. 1937), *cert. denied* 303 U.S. 635 (1938). The Senate and House bills would permit only the Department of Justice to file complaints in the federal courts. See S. 220, 98th Cong., 1st Sess. § 3192, 129 CONG. REC. S 418 (1983), and H.R. 3347, 98th Cong., 1st Sess. § 3192 (1983).

⁴¹ The court must have in personam jurisdiction over the accused in order to issue a legally binding extradition order. M. BASSIOUNI, *supra* note 34, at 514. While under present law a state court has jurisdiction to hear extradition proceedings, Extradition Act 18 U.S.C. § 3184 (1976), the Senate Bill would limit these proceedings to the federal courts. See S. 220, *supra* note 40, at § 3192(a).

⁴² M. BASSIOUNI, *supra* note 34, at 515 (1974).

(2) that the offense charged is among the extraditable offenses listed in the pertinent treaty,⁴³

(3) that the offense charged is "a crime of a specified degree in both the requested and requesting state,"⁴⁴ and

(4) that there is probable cause to believe that the accused committed the crime charged.⁴⁵

The bulk of the typical extradition hearing is focused on determining the fourth element, whether there is probable cause to believe the extraditee committed the crime charged. The role of an extradition magistrate, in this respect, has been likened to that of a judge in the preliminary hearing at a criminal trial.⁴⁶

Assuming that the four elements outlined above are satisfied, the court will grant the extradition request. Under present law, no direct appeal is permitted.⁴⁷ However, the extraditee may challenge the legality of his confinement by applying for a writ of habeas corpus.⁴⁸ The scope of habeas review, however, is very limited.⁴⁹

2. Role of the Executive

The executive branch "operates at both ends of the system."⁵⁰ It represents the first obstacle to a successful extradition request since the request must survive executive inspection.⁵¹ At the final stage in the process

⁴³ *Id.*

⁴⁴ Note, *Bringing The Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L. J. 71, 80 (1978). This requirement is known as the double criminality principle and is imposed in order that "a person's liberty is not restricted as a consequence of offenses not recognized as criminal by the requested state." I. SHEARER, *supra* note 3, at 137.

⁴⁵ See *infra* note 46 and accompanying text.

⁴⁶ *Benson v. McMahon*, 127 U.S. 457, 462, 463 (1889). Section 3184 of the present extradition law states that a magistrate shall grant the extradition request if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention." Extradition Act, *supra* note 32. By itself, § 3184 does not state the nature of evidence sufficient to justify extradition. However, each of the extradition treaties to which the United States is a party states that "extradition shall take place only if the evidence against the fugitive is sufficient to justify commitment for trial had the offense been committed in the requested State." M. BASSIOUNI, *supra* note 34, at 516 (1974). The federal courts have construed this language to require a probable cause standard. *Collins v. Loisel*, 259 U.S. 309 (1922). For a discussion of the distinction between a guilt standard and a probable cause standard, see *id.* at 316-17.

⁴⁷ The Department of State is similarly barred from appealing an extradition denial to an appellate court. The Senate bill, however, would permit direct appeal by both parties. See S. 220, *supra* note 40, at § 3195.

⁴⁸ *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

⁴⁹ See *Gallina v. Fraser*, 177 F. Supp. 856, 860 (D. Conn. 1959) for discussion of the elements of habeas review of a decision to grant extradition.

⁵⁰ M. BASSIOUNI, *supra* note 34, at 531.

⁵¹ *Id.*

it exercises executive discretion over judicial decisions adverse to the extraditee.⁵²

Executive discretion was first exercised in 1871 and judicially recognized two years later in *In Re Stupp*.⁵³ When the judiciary denies the extradition request the process is formally over, except for possible refiles by the executive.⁵⁴ Once the court grants extradition, however, the executive can undertake a *de novo* examination to determine whether the requirements of the treaty have been met.⁵⁵ This examination is not limited to the record and quite often the executive will uncover more evidence than would otherwise be obtained through judicial review.⁵⁶

U.S. extradition law commits the resolution of certain issues solely to the executive branch. The executive has exclusive authority to determine whether an extradition request is politically motivated⁵⁷ or whether an

⁵² *Id.*

⁵³ 23 Fed. Cas. 281 (No. 13562) (C.C.S.D.N.Y. 1873). Before 1842 the United States maintained an executive system of extradition. Its first extradition treaty, the Jay Treaty of 1794, failed to indicate which branch was to administer extradition proceedings. Absent provision for judicial participation, the executive freely surrendered individuals without judicial hearing. It was not until the surrender of Robbins to Great Britain that criticism arose over the unfettered discretion of the executive. Robbins' surrender drew bitter criticism because of the denial of a judicial hearing. The Webster-Ashburton Treaty, drafted partly to quiet this criticism, was not soon enough to avert the ouster of Adams administration. The disquiet over the Robbins case and the subsequent adoption of the judicial method by treaty in 1842 and by statute in 1848 is said to indicate a view held by America at the time that "surrender without judicial hearing" is opposite to that basic principle of constitutionalism. S. BEDI, *supra* note 15, at 137.

The proposal before the Senate is not necessarily contrary to constitutionalism. S. 220, *supra* note 40, retains judicial control over the bulk of the extradition process while withdrawing the political offense issue from judicial determination if it is at all raised by the extraditee.

⁵⁴ Lubet & Czackes, *The Role of The American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, at 199 (1980).

⁵⁵ *Id.* The Secretary has broad discretion to deny extradition after a judicial grant of extradition. For a discussion of the bases of executive discretion see Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962). Furthermore, the Secretary can attach conditions to the surrender of the accused. For example, the Secretary may stipulate that there be no trial for a crime other than that for which the accused is extradited. For discussion of this and other possible conditions see S. BEDI, *supra* note 15, at 149-155.

⁵⁶ Lubet & Czackes, *supra* note 54, at 199. Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1328 n.116 (1962).

⁵⁷ *Eain v. Wilkes*, 641 F.2d 504, 518 (7th Cir. 1981). The focus of the judge's inquiry is the crime itself, and the context in which it was committed. The executive, on the other hand, determines whether the requesting state may have had some ulterior motive for the request. Its decision will necessarily require its opinion of the honesty or dishonesty of the requesting state. The judge's analysis does not implicate the honesty of any official act of the requesting state—inquiry is purely a question of fact—either the crime was committed in connection with a violent political disturbance or it was not. *Id.*

Two reasons underly judicial deference with regard to the determination of the political

extraditable fugitive should be withheld for humanitarian reasons.⁵⁸ If the fugitive presents evidence on these questions in the extradition proceeding, the court is obligated to defer to the executive branch.⁵⁹

The executive and the judiciary share concurrent authority to determine whether the accused has committed a political crime for which he is exempt from extradition.⁶⁰ Under present law the courts will make this determination in the first instance.⁶¹ Executive discretion depends upon how the issue is resolved by the courts. If the court finds the political offense exception applicable, the executive cannot reverse this decision. However, if the court finds the political offense exception inapplicable, the executive can reverse the court and withhold the accused on the ground that he is a political offender.⁶²

Under the proposed method, the political offense exception would be shifted from the executive's concurrent jurisdiction to its exclusive jurisdiction. As a result, the executive would gain the authority to deny the applicability of the political offense exception.

D. *Limits on Executive Discretion over Extradition*

1. Constitutional Constraints

It is often stated that the executive decision to extradite is purely discretionary. This discretion is derived from Article II of the Constitution which empowers the executive to make and enforce treaties, including those pertaining to extradition.⁶³ While the executive's authority to enforce treaties acknowledges no limitations in Article II, due process concerns may provide an implicit limitation on the exercise of executive

motivation of the request. First, the Constitution empowers the executive to execute treaties. U.S. CONST. art. II § 2. When the executive is deciding whether a request was made for political reasons, he is, in effect, deciding whether the provisions of the pertinent extradition treaty are being observed. The making of an extradition request, neutral on its face but actually politically motivated, is a violation of the treaty. In effect, the crime alleged is a mere pretext for the extradition of an individual for a non-extraditable offense.

Second, under the Act of State doctrine, the judiciary is barred from looking behind the official acts of foreign governments to find unworthy motives. Judicial inquiry into the motives of the requesting states was just the kind of inquiry the doctrine was intended to prevent. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

Given a politically motivated request, the executive can deny the request, effectively short-circuiting the judicial process. It can also do so after the request has been granted by the magistrate under the rubric of executive discretion. Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1323 (1962).

⁵⁸ *Peroff v. Hylton*, 542 F.2d 1247 (4th Cir. 1976).

⁵⁹ See *supra* note 53.

⁶⁰ 18 U.S.C. § 3184 (1948); *Eain v. Wilkes*, 641 F.2d, at 513.

⁶¹ *Eain v. Wilkes*, 64 F.2d at 513.

⁶² I. SHEARER, *supra* note 3, at 199; M. BASSIOUNI *supra* note 34, at 534.

⁶³ U.S. CONST. art. II § 2.

discretion over extradition.

The decision to extradite represents a substantial interference with the liberty of the fugitive. In some circumstances, extradition will subject the fugitive to barbaric treatment in the requesting state. Ordinarily, the government must provide a hearing of some sort when it contemplates an action which would deprive an individual of liberty to that extent.

Present extradition law explicitly provides for judicial involvement in the extradition process.⁶⁴ It is unclear, however, whether judicial involvement is required as a matter of due process, and if so, what issues must be judicially determined. Few cases have examined this question because a judicial hearing is presently statutorily required.

Case law in an area analogous to extradition provides some measure of guidance on this question. The Supreme Court has held that due process is applicable in deportation cases.⁶⁵

Like the government's power to extradite, the power to deport is viewed as a plenary power⁶⁶ vested in the political branches of the government.⁶⁷ This power is based on a notion of self-preservation inherent in sovereignty that permits a sovereign nation to "forbid the entrance of foreigners within its dominion or to admit them only upon such conditions as they see fit to prescribe."⁶⁸

After *Fong Yue Ting v. United States*,⁶⁹ the plenary nature of the right to expel was thought to insulate the deportation process from constitutional safeguards. Under that opinion, Congress could deport aliens "whenever in its judgment their removal is necessary or expedient for the public interest."⁷⁰

In a later case, the Supreme Court retreated from this extreme position. In the *Japanese Immigrants Case*,⁷¹ the court held that the Fifth Amendment was applicable to deportation proceedings and that administrative officers responsible for the execution of deportation law must observe "the fundamental principles that inhere in 'due process of law.'"⁷² At the same time, the court narrowly construed the due process rights of the deportee, saying:

no person shall be deprived of his liberty without the opportunity at some time to be heard before such officers in respect of matters on which

⁶⁴ 18 U.S.C. § 3184 (1948).

⁶⁵ *Kwong Hai Chew v. Colding*, 344 U.S. 550 (1953); *See also United States v. Shaughnessy*, 187 F.2d 137, 141 (2nd Cir. 1951).

⁶⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

⁶⁷ *Id.* at 713.

⁶⁸ *Id.* at 705.

⁶⁹ 149 U.S. 698 (1893).

⁷⁰ *Id.* at 724.

⁷¹ 189 U.S. 86 (1903). The docket title was *Yamataya v. Fisher*.

⁷² *Id.* at 100.

liberty depends—not necessarily an opportunity upon a regular set occasion and according to the forms of judicial procedure but one that will secure the prompt, vigorous action contemplated by the Congress and at the same time be appropriate to the nature of the case upon which such officers are required to act.⁷³

The line of deportation cases show that due process concerns have increased through the years, but not to the point where a deportee is constitutionally entitled to a judicial hearing. Extradition bears some resemblance to deportation, yet different policies underly extradition and therefore the expulsion cases can be distinguished. As the Court said in *Fong Yue Ting v. United States*:

Strictly speaking . . . “extradition,” and “deportation,” although each has the effect of removing a person from the country, are different things, and have different purposes. . . . “Extradition” is the surrender to another country of one accused of an offense against its law, there to be tried, and, if found guilty, punished. “Deportation” is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or of those of the country to which he is taken.⁷⁴

Inasmuch as the possible effect of extradition is to subject the extraditee to barbaric treatment in the requesting state, it is clear that a much greater degree of process is due the extraditee than the deportee.

One case has held that a fugitive is constitutionally entitled to a hearing and a judicial determination of the basis for extradition.⁷⁵ The case suggests that executive power in the area of extradition is not without restriction.

In *Sayne v. Shipley*,⁷⁶ the defendant committed armed robbery in the Republic of Panama and fled immediately into the Canal Zone. A regulation of the Canal Zone, then a U.S. possession, provided for extradition of fugitives upon the request of the demanding state but failed to

⁷³ *Id.*

⁷⁴ *Fong Yue Ting v. United States*, 149 U.S. at 709.

⁷⁵ *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969). Unlike a criminal case, the purpose of an extradition proceeding is not to adjudicate the guilt or innocence of the extraditee. Aside from the determination of a few legalistic technicalities, the predominant purpose of the proceeding is to determine whether there is probable cause to believe that the extraditee committed the offense charged. *Id.* at 685. Accordingly, the extraditee may not present exculpatory evidence which bears upon the issue of whether the extraditee should stand trial in the requesting country. *Id.* Since the ultimate guilt or innocence of the accused will not be determined at the extradition proceeding, the Sixth Amendment has been held not applicable. See *United States v. Galanis*, 429 F. Supp. 1215 (D. Conn. 1977).

⁷⁶ 418 F.2d 679 (5th Cir. 1969).

provide for an automatic right to a judicial hearing.⁷⁷ The defendant was taken into custody by Canal Zone authorities pending extradition to The Republic of Panama. The defendant then petitioned for a writ of habeas corpus in the United States District Court for the District of the Canal Zone. The petition was denied. On appeal, the defendant argued that the Canal Zone Code, in failing to accord the defendant an automatic hearing before a judicial officer, violated his due process rights. The court held that a full habeas corpus hearing was due process to the defendant, even though the hearing occurred after an executive decision to extradite.⁷⁸ To the court, the important consideration was not when the hearing occurred, but whether the individual had recourse to the courts to ensure compliance with the treaty and statute.⁷⁹

While the court held that some kind of judicial review was required, although not necessarily in the first instance, the most significant part of the decision is the nature of the habeas review accorded the extradition order in the case. The lower court in *Sayne* gave a full hearing "on all issues that would have been pertinent to extradition proceedings pursuant to 18 U.S.C.A. § 3184."⁸⁰ In that sense, it was identical to a judicial hearing in the first instance but merely given after the extradition order entered by the executive.

It is unclear whether to regard *Sayne* as an anomaly. *Sayne* is alone in holding that a fugitive is constitutionally entitled to a judicial hearing prior to his extradition. The problem with *Sayne* is that the principle it articulates—that an extraditee is constitutionally entitled to a judicial hearing prior to his extradition—does not admit of easy limitation. *Sayne* provides no guidance as to what issues must be determined judicially. Taken to its extreme, *Sayne* establishes a constitutional right to a hearing on all issues pertaining to extradition. This is clearly not the case. For example, the executive regularly determines the motivation of the request to determine whether the request is fraudulent.⁸¹ It has never been argued that unreviewable executive determinations regarding the political motivations of the request violate the extraditee's due process rights. Other examples of unreviewable executive determinations can be posited.⁸²

In summary, while one case has held that a judicial hearing of some sort is required previous to extradition, some issues can be conclusively

⁷⁷ C.Z. Code tit. 6, § 5082 (1963).

⁷⁸ *Sayne v. Shipley*, 418 F.2d at 686.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *supra* notes 50-62 and accompanying text.

⁸² For example, the courts have said it is for the executive to determine whether the extraditee should not be extradited on the ground that he would not receive a fair trial in the requesting state.

determined by the executive without judicial review. Thus, when contemplating the advisability of vesting the political offense exception in the executive domain, it is important to remember that, as a matter of constitutional law, this is permissible. The Congress "may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend"⁸³ as Congress has done with respect to extradition, but this is a question of policy, not constitutional obligation.

2. International Obligations

Absent an applicable provision in a treaty, Congress is free to implement extradition in any manner it pleases. Most treaties do not specify which organ of government is to execute the extradition obligations therein.⁸⁴ However, in the last few years, three treaties to which the United States is a party have vested the executive with exclusive authority to administer the political offense exemption.⁸⁵

Extradition is viewed as a matter of domestic jurisdiction and therefore not a principle of international law.⁸⁶ Thus, while international law permits and favors the refusal of extradition of persons for offenses of a political character,⁸⁷ states are free, absent treaties, to extradite individuals adjudged or viewed to be political offenders.⁸⁸ As a result the states have variously interpreted the scope of the political offense doctrine. "Some countries interpret the concept broadly so as to protect the individual, while others consider a strict interpretation more consonant with the requirement of international cooperation."⁸⁹ What may be a political offense in one country is a common crime in another.⁹⁰

Similar discretion inheres in the states to implement extradition treaties and while some employ an executive method of rendition, the vast majority judicially administer their extradition obligations.⁹¹

⁸³ *Fong Yue Ting v. United States*, 149 U.S. at 174.

⁸⁴ I. SHEARER, *supra* note 3, at 197.

⁸⁵ Those treaties are Extradition Treaty United States-Mexico, May 4, 1978, art. 5(1), 31 U.S.T. —, T.I.A.S. 9656, S. Doc. No. 33, 97th Cong., 1st Sess. (1981) (Senate ratification of U.S.-Netherlands Extradition Treaty) and S. Doc. No. 33, 97th Cong. 1st Sess. (1981) (Senate ratification of U.S.-Columbia treaty).

⁸⁶ Garcia-Mora, *supra* note 14, at 1227.

⁸⁷ J. MOORE, *supra* note 1.

⁸⁸ Garcia-Mora, *supra* note 14, at 1228.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1229 n. 13.

⁹¹ S. BEDI, *supra* note 15, at 136.

E. The Substantive Common Law Approach

Political offenses are of two types: pure and relative. Pure political offenses include treason, sedition and, often, espionage.⁹² Relative political offenses are harder to define because they are common crimes that most often have political motivations.⁹³ Evaluation of the political elements of relative political offenses is a difficult process, involving questions of ideology, morality and human rights.⁹⁴

Anglo-American courts have developed a test for determining whether the extraditee's act was a relative political offense. In *Re Castioni*⁹⁵ first articulated this test. Castioni, a native of the Swiss canton of Ticino, fatally shot a cantonal government official. The murder took place when Castioni, as part of a large crowd opposed to the government's policies, stormed and occupied the seat of government.⁹⁶ The court refused to extradite Castioni to Switzerland because a political uprising existed at the time and place of the offense and because the offense committed was incidental to and in furtherance of the uprising.⁹⁷ Thus, the court concluded that Castioni's act was a political offense and denied extradition.

This two-part political incidence test was incorporated into American case law in 1894 in *In Re Ezeta*.⁹⁸ Ezeta, vice-president and commander-in-chief of the army of Salvador, was charged with murder in the hanging death of a young man accused of being a spy during the revolution against his government.⁹⁹ The court ruled that the offense occurred during a state of seige and that Ezeta was seeking to maintain the authority of the government against a revolutionary uprising.¹⁰⁰ Under the political incidence test, Ezeta was not extradited. The test has been consistently applied by American courts since *Ezeta*.¹⁰¹

F. The Recent Cases

New patterns of international crime, particularly international terrorism, have complicated the courts' efforts to apply the *Castioni* test.

⁹² Garcia-Mora, *supra* note 5, at 375.

⁹³ *Id.* at 377.

⁹⁴ 1 L. OFFENHEIM, *supra* note 2, at 646; I. SHEARER, *supra* note 3, at 187; Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1, 21 (1963).

⁹⁵ 1 Q.B. 149 (1891).

⁹⁶ *Id.* at 150-151.

⁹⁷ *Id.* at 158-160.

⁹⁸ 62 F. 972 (N.D. Cal. 1894).

⁹⁹ *Id.* at 976 et seq.

¹⁰⁰ *Id.* at 1002.

¹⁰¹ E.g., *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); *Karadzole v. Antukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); *Jiminez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir. 1980).

Critics are concerned that a dispassionate, objective analysis by the judiciary of the character of the extraditee's offense will result in the inclusion of terrorism within the meaning of the political offense exception.¹⁰² Three recent extradition cases have brought this criticism to its head.

In *In Re McMullen*,¹⁰³ a former member of the Irish Republican Army (IRA) sought by the United Kingdom on charges related to an IRA bombing of a military barracks was not extradited. This offense was deemed political under the political incidence test. The magistrate found that the conflict in northeastern Ireland was a political uprising and that an attack on such a military target was incidental to and part of that uprising.¹⁰⁴

In *Eain v. Wilkes*,¹⁰⁵ a member of the Palestine Liberation Organization (PLO) was sought by Israel for murder and related offenses in connection with the PLO bombing of a youth rally in the Israeli city of Tiberias which killed two young men and injured 27 others. The magistrate characterized the struggle in the Middle East between Israel and the Palestinians as a political conflict.¹⁰⁶ Eain, however, was extradited, because the magistrate ruled that an act of random terrorism against indiscriminate targets was not incidental to the conflict, and was therefore a common offense.¹⁰⁷ The Seventh Circuit affirmed a holding that terrorist acts do not bear sufficient relationship to stated political goals and thus cannot be in furtherance of a political uprising.¹⁰⁸

Finally, in December 1981, the Second Circuit in *United States v. Mackin*,¹⁰⁹ affirmed the findings of a magistrate¹¹⁰ who refused to extradite Desmond Mackin, a member of the IRA charged by the United Kingdom with the attempted murder of a British soldier in Belfast.¹¹¹ As in *McMullen*, the conflict in northeastern Ireland was characterized as a political contest over control of the state. The offense was held to be incidental to that contest.¹¹²

The results of these three cases put the problem in perspective. Each case involved a crime committed against a U.S. ally. Each crime was of an

¹⁰² See generally DEP'T OF STATE, LEGAL ASPECTS OF INTERNATIONAL TERRORISM (A. Evans and J. Murphy eds. 1978).

¹⁰³ No. 3-78-1099-MG (N.D. Cal. May 11, 1979). See description of *McMullen* in Note, *American Courts and Modern Terrorism: the Politics of Extradition*, 13 N.Y.U. J. INT'L POL. 617, 637-38 (1980).

¹⁰⁴ *Id.*

¹⁰⁵ 641 F.2d 504 (7th Cir. 1981).

¹⁰⁶ *Id.* at 520.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 520-523.

¹⁰⁹ 668 F.2d 122 (2d Cir. 1981).

¹¹⁰ No. 80 Cr. Misc. 1, slip op. (S.D.N.Y. Aug. 13, 1981).

¹¹¹ 668 F.2d at 122.

¹¹² *Id.*

extremely violent nature. The courts in *McMullen* and *Mackin* denied extradition. The court in the *Eain* case granted the request.

The specific criticisms of current judicial practice fall into three groups. First, critics contend that the determination of whether an offense is political is a decision which is intrinsically political, intimately connected with foreign policy and as such without objective criteria.¹¹³ The courts are considered an inappropriate forum for such a decision, which is usually made by the Executive.¹¹⁴ Second, judicial determination of whether an offense is political has potentially adverse foreign policy consequences because courts will sometimes rule against friendly nations.¹¹⁵ When a court analyzes the political setting of a friendly nation and decides that a political uprising exists, embarrassment to the U.S. Government results.¹¹⁶ Finally, the judicial method is viewed as unsuited to the control of "international terrorism."¹¹⁷ If a U.S. court should characterize a terrorist act as a political offense, terrorists might be encouraged to seek haven in this nation.¹¹⁸ Furthermore, a judicial characterization of such acts as political may be regarded as an American endorsement of terrorism, contrary to our official posture condemning terrorism.

III. ANALYSIS

Much of the controversy concerning the current administration of the political offense doctrine is attributable to the disparate nature of the values extradition was designed to serve. One author has argued that a framework for extradition should serve five values:

- (1) the recognition of the "national interest" of the states who are parties to the extradition proceeding;
- (2) the international duty to preserve and maintain world public order;
- (3) the effective application of minimum standards of fairness and justice to the relator in the extradition process;
- (4) a collective duty on the part of all states to combat criminality; and
- (5) the balancing of these factors within the juridicial framework of the "Rule of Law."¹¹⁹

¹¹³ Memorandum on Extradition Legislation, 127 Cong. Rec. § 9954, § 9956 (daily ed., Sept. 18, 1981) [hereinafter cited as Memorandum].

¹¹⁴ *Id.*

¹¹⁵ Judicial decision in political offense cases can have "a devastating impact on United States relations with the requesting country." *Id.*

¹¹⁶ A court is not "an appropriate or desirable forum for a careful analysis of a friendly foreign state's intention or political system." *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* and n.61 at § 9959.

¹¹⁹ M. BASSIOUNI, *supra* note 34, at 222.

Perhaps in a system of extradition not providing for the political crimes exception, each of the values set forth above could be faithfully served. Yet, even this is unlikely since the results dictated by any two values are bound to conflict. The presence of the political offense concept will necessarily make matters worse. For example, strict adherence to the duty to preserve and maintain world public order would mean that states would extradite political offenders without exception. And further, pursuit of shortsighted national interest, if unregulated, would effectively subsume the political offense doctrine.

It is therefore a fair assumption that a system of extradition, however conceived, cannot hope to serve all factors in all respects. The best system of extradition, as a practical matter, should be designed to accommodate as many interests as possible in the order of their importance in the particular case.

The prevailing criticism of the present system of extradition focuses on the unacceptability of certain results reached by the courts.¹²⁰ It is an overreaction, however, to vest the executive with exclusive and unreviewable authority over the political offense exception. To do so would amount to a tacit repeal of the political offense exception as it presently exists.¹²¹ A better solution would be to retain jurisdiction in the courts to insure that the political offense decision is made neutrally and objectively, and adopt a legal test that would eliminate these unacceptable results.

The balance of this note is an effort to illuminate the problems with an executive determination of the political offense exception and to demonstrate the ability of the courts to make political offense determinations. The note will also consider alternatives to the present administration of the exception and point out their deficiencies when compared to the status quo.

A. *Decisionmaking Considerations Relied Upon By Each Branch*

1. State Department: Immediate Foreign Policy Needs

The Secretary of State's central function is to implement foreign policy in a manner that will maximize state interests.¹²² Only rarely do ideo-

¹²⁰ See *supra* notes 113-18 and accompanying text.

¹²¹ See *infra* notes 122-33 and accompanying text.

¹²² "State interests" are the conditions which seem to be necessary or desirable to the survival and flourishing of the state. J. WAKELIN, *THE ROOTS OF DIPLOMACY* 18 (1965). "Most statesmen see it as their duty to put national interest first . . . Thus, the student of interstate relations should not normally be misled about the claims of statesmen to be acting for the good of humanity, or resisting anti-Christ, or for Communism, or for Buddhism. He should normally be able to explain a state's move by showing how it was those responsible for it hoped by it to secure or extend the national interest." *Id.* at 134-135.

logical concerns, such as the promotion of liberty, motivate diplomats.¹²³ The Secretary will invariably consider the national and strategic interests of the United States as the predominant factor in political offense decisions. Given the predilection of U.S. policymakers to perceive the support of authoritarian regimes as consistent with the national interest, it is unlikely that motives such as the promotion of political liberty and the refusal to abet foreign political repression will receive significant consideration.¹²⁴

State Department determinations of the nature of the extraditee's offense will emphasize the values of political and diplomatic expediency, to the exclusion or minimization of fairness and justice. The emphasis in political offense decision-making would shift from the actual, objective nature of the claimed political offense to the extrinsic effects of the characterization itself.

Expediency considerations would alter the political offense exception in four ways. First, the Secretary's approach to the exception would result in two standards: one for friendly nations and one for other nations. One argument offered in support of exclusive executive jurisdiction over the political offense issue is that court rulings sometimes offend friendly nations and that this problem will be solved if the Secretary characterizes the extraditee's claimed political act.¹²⁵ This implies that friendly nations will not disapprove of the Secretary's decisions because the Secretary will not rule against them. However, this overt dualism will weaken American credibility as a defender of political liberty.

Secondly, having the executive decide the political offense exception may encourage state terrorism.¹²⁶ *United States v. Gonzales*¹²⁷ illustrates

¹²³ "If we are to believe what statesmen say, they have been motivated frequently not by interest so much as by desire to serve the cause they believe to be right and to defend a certain way of life. In practice, however, it is hard to find occasions where statesmen have long acted in defiance of national interest, whereas it is easy to find occasions where ideologically opposed states have been aligned for reasons of national interest." *Id.*

¹²⁴ Of course, any opposition between U.S. national interest and support of human rights may be overstated. A foreign policy that encourages human rights abroad may be entirely consistent with the national interest. S. VOGELGESANG, *AMERICAN DREAM, GLOBAL NIGHTMARE* 264-271 (1980).

¹²⁵ Executive determination "permits a more informed decision on extradition to be made in a manner less likely to be offensive to the friendly foreign government in the case." Memorandum, *supra* note 113, at § 9956 (Emphasis added.)

¹²⁶ State terrorism is simply the commission of terrorist acts by governments. Famous examples include "the Spanish Inquisition, St. Bartholomew's Massacre (24 August 1572), the Reign of Terror in Revolutionary France (1793-94), the Fascist's 'squadrons' in the 1920s, Stalinism, and the so-called forms of 'vigilantism' . . . such as OAS terrorism for maintaining French sovereignty in Algeria." Bonante, *Some Unanticipated Consequences of Terrorism*, 16 J. OF PEACE RESEARCH 197, 199 (1979).

¹²⁷ 217 F. Supp. 717 (S.D.N.Y. 1963).

this problem. The extraditees were high-ranking Honduran military officers whose government was overthrown by popular rebellion. They were sought on charges alleging that they tortured and killed two rebel prisoners during the course of the rebellion. Initially, the Secretary of State refused the extradition request on the ground that the offense was political.¹²⁸ The court, however, ruled that the offense was not political because the torture was not sufficiently related to the political goal of defending the existing government.¹²⁹ Gonzales was therefore extradited. *Gonzales* suggests that excessive or barbaric crimes committed by friendly but oppressive regimes for which extradition is later sought would very likely be classified as political offenses by the Secretary of State. Such determinations would encourage state terrorism, contrary to the official American policy of suppressing terrorism.

Thirdly, characterization of the offense by the Secretary would be overinclusive since it would result in the extradition of genuine political offenders, both peaceful and military. Violent and non-violent opponents of authoritarian regimes friendly to the United States would probably be deported as common criminals for crimes related to political opposition. Support of authoritarian, anticommunist regimes in the Third World is viewed as important to our national security interest.¹³⁰ The repressive character of such governments often generates considerable internal dissent,¹³¹ manifested by both violent and nonviolent political opposition. The Secretary would have a strong policy disincentive to characterize such offenses as political and the Secretary would be unlikely to allow opponents of friendly governments to escape extradition as political offenders.¹³²

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Cohen, *Human Rights Decision-Making in the Executive Branch: Some Proposals for a Coordinated Strategy*, in *HUM. RTS. & AM. FOREIGN POL'Y* 216, 229 (D. Kommers & G. Loescher eds. 1979).

¹³¹ "[P]olitical crimes are committed by the best of patriots and, what is of more weight, they are in many cases a consequence of the oppression on the part of the respective governments." 1 L. OPPENHEIM, quoted in *Proceedings*, *supra* note 2, at 160.

¹³² The probable characterization of political crimes as common offenses would operate against both violent and nonviolent political dissidents. This would surely occur in the case of a violent political opponent. Violence, though abhorrent and condemned by the United States as a means of political reform, is often the tool of political change of last resort. It has resulted in the political independence of many nations, including the United States. Therefore, extraditing violent political offenders may not be an unqualified good. The same expediency-motivated results might also obtain in cases where a nonviolent opponent is sought for extradition. Many opponents of friendly but authoritarian regimes are in the United States and could therefore be vulnerable to extradition. The extradition of such individuals as common criminals would create a disincentive in these nations to engage in nonviolent political strategies.

Finally, the power to characterize the extraditee's offense might be used as a bargaining chip in the daily course of international diplomacy. This could result in defendant-swapping in which the United States and the requesting state might discreetly agree to exchange extraditees.¹³³ In such a case, the diplomatic value of the exchange would tend to overshadow the merits of either extraditee's claim. Furthermore, State Department determinations of the political offense exception might result in more obvious abuses, such as the delivery of a political opponent of a harsh but oil-rich government in return for oil.

a. Executive Discretion in a Similar Area

The State Department's discriminatory application of its power to deny visas lends support to the preceding analysis. In its review of visa applications from Irish nationals, for example, the State Department has discriminated for reasons of diplomatic and political expediency.¹³⁴ Such a discriminatory policy is possible only by spurious application of statutory exclusion rules to certain individuals. Of course, it is clear that a distinction exists between the denial of a visa, which merely forbids an alien to enter the United States, and the approval of extradition, which will usually subject the alien to criminal punishment. Nevertheless, the foreign policy and diplomatic impact of the two decisions are similar. Furthermore, given executive determination of the political offense exception, the Secretary would have the same broad discretion in political offense cases that now exists in visa cases.

Congress has directed the State Department to exclude certain classes of people from admission to the United States.¹³⁵ Among the classes denied admission are the mentally infirm, those convicted of crimes of moral turpitude, polygamists, prostitutes, anarchists and communists.¹³⁶

Since the renewal of violence in northeastern Ireland, the State Department has consistently denied entry visas to Irish nationals who are either Irish Republicans or members of the political party, Sinn Fein.¹³⁷ Visas have been denied to these individuals on the ground that their ad-

¹³³ Letter of Christopher Pyle, Assoc. Prof., Dept. of Politics, Mt. Holyoke College, N.Y. Times, Jan. 11, 1982, at A18, col. 3.

¹³⁴ COMMITTEE ON THE JUDICIARY, 95TH CONG., 2D SESS., NORTHERN IRELAND: A ROLE FOR THE UNITED STATES? (Comm.-Print 1978) [hereinafter cited as NORTHERN IRELAND].

¹³⁵ 8 U.S.C. § 1201(g)(1).

¹³⁶ 8 U.S.C. §§ 1182(a)(1)-(31) sets out the classes of aliens denied admission to the United States.

¹³⁷ Sinn Fein, the oldest existing Irish political party and the only one operating throughout Ireland, favors national unification. See O. MACARDLE, THE IRISH REPUBLIC 65 (4th ed. 1951) and J. BELL, THE SECRET ARMY: THE IRA 1916-1979 16-26 (2d ed. 1980).

mission is inconsistent with public welfare;¹³⁸ often their only infirmity was political advocacy.¹³⁹ At the same time, Northern Irish loyalists,¹⁴⁰ including members of the violent paramilitary Ulster Defense Association, have been granted entry visas.¹⁴¹ This approach is overtly dualistic since groups of similar tactics (violent rhetoric coupled with actual use of violence) are treated dissimilarly.¹⁴²

Clearly, such discrimination is based on political and diplomatic expedience considerations. Irish Republicans oppose the presence of Britain, a close American ally, in Ireland. Loyalists support the British presence. In order to prevent British enemies from engaging in propaganda on behalf of their interests in the United States, the State Department has used its legislatively conferred discretion to deny visas to members of one political group, while granting visas to members of another, whose interests are not inimical to an ally.

There is no reason to conclude that diplomatic expediency would play a less important role in political offense cases.¹⁴³ Inconsistency in the granting of visas is perhaps intellectually unappealing but it does not impair the fundamental liberty or well-being of the party denied a visa.

¹³⁸ The specific passages under which the Irish nationals have been excluded are 8 U.S.C. § 1182(a)(27):

"Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;"

and § 1182(a)(28)(F):

Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury or destruction of property; or (iv) sabotage . . .

¹³⁹ N.Y. Times, Dec. 17, 1981.

¹⁴⁰ Loyalists are residents of northeastern Ireland who favor continued British rule. For an analysis of loyalists and loyalism, see G. BELL, *THE PROTESTANTS OF ULSTER* (1976).

¹⁴¹ *NORTHERN IRELAND*, *supra* note 134, at 30-31.

¹⁴² *Id.* The pattern of discrimination has continued through 1981. In December, Owen Carron, a Sinn Fein Member of Parliament from Fermanagh-South Tyrone, was denied a visa. N.Y. Times, December, 1981. During the same week, three associates of Ian Paisley received visas to engage in a Loyalist publicity tour in the U.S. Paisley himself, however, had his visa revoked under pressure from Irish-Americans and Congress. N.Y. Times, Dec. 22, 1981, at 5, col. 1. The denial of admission to both a prominent Republican and to a prominent Loyalist may have been an attempt by the State Department to appear even-handed. In fact, the pattern of discrimination continued since close associates of Paisley were allowed to enter.

¹⁴³ In fact, there may be a greater incentive in extradition cases because the State Department then deals directly with the requesting state rather than merely with foreign nationals, as in visa requests.

However, the same discriminatory exercise of executive discretion in political offense cases would affirmatively impair the freedom of a politically-motivated offender. The United States would be delivering a political opponent into the hands of the state which he opposes. In an area where liberty is at stake, consistency and fairness should be considered along with expediency and policy.¹⁴⁴ Courts consider all these factors to some degree. The Secretary of State would consider the latter predominately, if not exclusively. If these values conflict, the extradition law of a democracy should be structured so as to favor consistency and fairness over expediency and policy.¹⁴⁵ Nonextradition of a political offender, after all, need not constitute a U.S. embrace of the extraditee. He may be, and often is, deported to another country.¹⁴⁶

2. Judiciary: A Multiplicity of Values

Courts generally apply the political incidence test in a politically neutral manner. Courts analyze the objective and the factual setting of the offense, without looking beyond these narrow facts to the underlying ideological nature of the requesting state or of the extraditee's cause. However, the courts will consider all competing values at stake in political offense cases and will distribute determinative weight among them on a case-by-case basis.¹⁴⁷ Accordingly, they sometimes ignore the results of the common law test and rest their decisions on purely political factors, such as the undesirability of sending an extraditee to a communist nation.¹⁴⁸

The ideological justification of the political offense exception, the reluctance to aid in foreign political repression,¹⁴⁹ might seem to require courts to examine the specific political characteristics of both the request-

¹⁴⁴ The judicial role in extradition was included in the Anglo-American Treaty of 1842 in order to guarantee that the rights of the accused be protected. Comment, *Unraveling the Gordian Knot: The United States Law of International Extradition and the Political Offender Exception*, 3 FORDHAM INT'L L. F. 141, 150 (1979). The restriction of the political offense exception would be a severe blow to human rights. Garcia-Mora, *The Columbian-Peruvian Asylum Case and The Doctrine of Human Rights*, 37 VA. L. REV. 927, 927-965 (1951).

¹⁴⁵ "Founded as the government of the United States is, on the right to revolution to surrender political offenders would be a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind." J. MOORE, *supra* note 1, at 305-306. "Every doubt in a political offense case ought to be resolved in favor of human liberty and not against it." PROCEEDINGS, *supra* note 9, at 160.

¹⁴⁶ Desmond Mackin, for example, was deported to the Republic of Ireland at the end of the extradition proceedings. N.Y. Times, Dec. 31, 1981, at 22, col. 5.

¹⁴⁷ See *infra* notes 149-60 and accompanying text.

¹⁴⁸ See *infra* note 165.

¹⁴⁹ See *supra* notes 10-13 and accompanying text.

ing state and of the extraditee. If the political offense exception required such an evaluation, the exception would merely be an exception for those who oppose governments unfriendly to the United States. Instead, the political offense exception is implemented in the essentially politically neutral manner dictated by the political incidence test.

When applying the test, courts do not pass judgment on the ideological proximity of the requesting state to the ideal of American democratic government or on the ideological appeal of the extraditee and his cause. Instead, the test requires the court to ascertain whether there is a political conflict in the requesting state and whether the offense committed was in furtherance of that conflict.¹⁵⁰ Although these questions are charged with political implications, the investigation necessary to answer them does not involve a judicial evaluation of the ideological and political posture of the requesting state or of the extraditee.

The political neutrality of the judicial inquiry involved in political offense cases is demonstrated in the *McMullen*,¹⁵¹ *Eain*,¹⁵² and *Mackin*¹⁵³ cases. In each case, the requesting state was a democratic nation closely allied with the United States. Thus, the dissimilar results in the cases are due to the objectively different nature of the offenses involved and not to political distinctions. In *Eain*, the attack on a civilian youth rally was deemed more common than political and, therefore, not incidental to a political contest.¹⁵⁴ In *McMullen* and *Mackin*, the offenses charged were attacks on military targets of a party directly involved in a political contest.¹⁵⁵

The results of these cases do not indicate greater sympathy of the United States, or even of federal magistrates, for the IRA than for the PLO. Rather, they demonstrate the politically neutral and objectively factual nature of the inquiry demanded by the political incidence test. The reluctance to be an accomplice of a foreign government's persecution of its political opponents applies with equal validity to any government. The very inclusion of the political offense exception in all U.S. treaties, even those with closely allied nations, bears out the political neutrality of the inquiry.

Yet, in certain cases, the courts will base their decisions on political considerations, if those considerations are compelling in a particular case. A distinctive characteristic of the judicial determination of the political offense exception is the ability of courts, in contrast to the Secretary of

¹⁵⁰ See *supra* note 104.

¹⁵¹ No. 3-78-1099-MG (N.D. Cal. May 11, 1979).

¹⁵² 641 F.2d 504 (7th Cir. 1981).

¹⁵³ 668 F.2d 122 (2d Cir. 1981).

¹⁵⁴ See *supra* notes 105-08 and accompanying text.

¹⁵⁵ See *supra* notes 103-04 and 109-12 and accompanying text.

State, to consider all of the values involved in extradition proceedings. A standard application of the political incidence test will usually effectuate a balance among the competing values of combatting criminality, maintaining world public order and applying standards of fairness and justice. Such balancing seems to exclude such factors as the national interest and diplomatic and foreign implications. In practice, however, courts do consider these factors and sometimes adjust their normally strict application of the political incidence test to serve these values.

This process of flexibility and adjustment was at work in *Karadzole v. Artukovic*.¹⁵⁶ The Yugoslav Government requested the extradition of a former Croatian Government official who was charged with war crimes against the civilian population during the Italo-German occupation. The court ruled that the crimes for which extradition was requested were political and therefore not subject to extradition.¹⁵⁷ This result is notable because war crimes are generally not considered political offenses¹⁵⁸ and because under the political incidence test, the crimes could not have been political since no political uprising or contest existed at the time of the offense.

This seemingly anomalous result rested on foreign policy grounds. The court refused to apply the common law because the communist's control of Yugoslavia demanded that the test be relaxed so that "ordinary crimes that have no political significance will thereby be excused."¹⁵⁹ In other words, the court refused to apply the common law test where the result would have been to ship the extraditee to a communist nation. The *Karadzole* case demonstrates that values extraneous to the political incidence test, such as foreign policy concerns, are considered by the courts in exceptional cases.¹⁶⁰

Karadzole highlights the ability of courts to consider all the values at stake in political offense cases, including questions of interest and expedi-

¹⁵⁶ 247 F.2d 198 (9th Cir. 1957).

¹⁵⁷ *Id.* at 203-204.

¹⁵⁸ Garcia-Mora, *supra* note 5, at 394-396.

¹⁵⁹ 247 F.2d at 203. The court quoted from and largely relied on the British case, *Ex parte Kolczynski* 1 All E.R. 31 (1954), in which a mutiny by Polish sailors who then sailed to England and sought asylum was characterized a political offense notwithstanding the absence of a political uprising in Poland. The court declined to apply the political incidence test in order to avoid sending the extraditees to a Communist nation.

¹⁶⁰ The recent case of *Eain v. Wilkes*, also suggests that courts consider the entire range of values at stake in political offense cases. A strict application of the political incidence test in *Eain* might have resulted in the non-extradition of *Eain*. Instead, the court modified the common law test to extradite *Eain* as a common criminal. This result was based on the pragmatic concerns that a contrary result would encourage terrorists to seek haven in the United States and that non-extradition in such cases would have undesirable domestic social consequences. Implicitly, the vulnerable position of a close ally was a basis of the decision. *Eain v. Wilkes*, 641 F.2d at 520.

ency. Of course, courts will rule against the perceived, short-term national and diplomatic interests, such as in *Mackin*. It is precisely, however, this ability to consider all factors and to assign weight among them on a case-by-case basis that distinguishes judicial determination from executive determination where expediency considerations alone receive paramount attention.

B. Practical Difficulties Inhering in Judicial Administration of the Political Offense Exception

1. Judiciary's Ability to Judge Political Facts

Judicial administration of the political offense exception has been criticized on the ground that courts are unable to make political judgments and therefore, should defer to the executive branch which has the expertise and informational resources to make political determinations.¹⁶¹ This is plainly incorrect.¹⁶² The inquiry under the current formulation of the political crimes defense is to determine whether "there was a violent political disturbance in the requesting country at the time of the alleged acts"¹⁶³ and whether "the acts charged against the person whose extradition is sought was recognizably incidental to the disturbance."¹⁶⁴ In making a determination, the courts are essentially engaging in their traditional inquiry, perusing a record compiled through the efforts of the parties, deriving findings of facts therein, and characterizing those facts under the guidance of legal standards. Thus, in *Eain*, where the question was whether the lower court's finding of conflict was sufficient to establish that "there existed in Israel" a "violent political disturbance such as war, revolution or rebellion,"¹⁶⁵ the court looked at the nature of the conflict between Israel and the PLO and concluded that such conflict was not within the meaning of "violent political disturbance," since it did not involve "on-going organized battles between contending armies."¹⁶⁶ The analysis in *Eain* did not require the court to take a position on the events transpiring in the Middle East because the court was obliged merely to determine whether a state of disturbance existed, within standards devel-

¹⁶¹ Memorandum, *supra* note 113, at § 9956.

¹⁶² That is not to say that judicial decisions with regard to the political offense exception will not have adverse foreign policy consequences. A denial of extradition on any grounds is bound to have an adverse effect on the relations between the requesting and requested states. Yet there is a distinction between the effect of the decision and the nature of the inquiry, the former political in nature, the latter essentially factual.

¹⁶³ *Eain v. Wilkes*, 641 F.2d at 516.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 519.

¹⁶⁶ *Id.* The *Eain* case is also illustrative of the court's ability to use precedent in a way that encourages reasoned, uniform decisions.

oped by the courts, at the time the offense was committed.

Critics argue, however, that the State Department's superior informational resources foster the Secretary of State's appreciation of facts, which are concededly judicially discoverable and therefore, makes the State Department the better forum.¹⁶⁷ While unique resources may be available to the executive, the State Department has made it a practice to share such information with the courts during extradition proceedings¹⁶⁸ and State Department officials have made themselves available for testimony.¹⁶⁹ Given this sharing of resources, it is hard to understand why a diplomat, with substantially the same resources available to him as a court, would make a superior determination of the facts.

It is evident that when a court makes findings of facts and judicial determinations regarding the political offense issue, it is operating from the same informational base and perception level as the State Department if the State Department were to decide the issue. The determinative factor, however, which separates judicial and executive determination is the intrinsic benefits of judicial hearings. Judicial administration of the political offense exemption retains the virtues which inhere in an adversary system. The mark of an adversary system is a dispassionate neutral judge making impartial findings of facts based upon the controversy between opposing parties.¹⁷⁰ The adversary process is generally preferred to an inquisitorial procedure.¹⁷¹

Furthermore, the judicial process has the virtue of assuring a fair hearing. The courts have long experience in conducting hearings. Although it can be argued that in time the executive would gain the experience to conduct a fair hearing, under the domination of the Secretary of State, the executive officer could not be impartial because he would be required to conform his decision to the foreign policy dictates of the Secretary. Under the newly proposed House and Senate bills the extraditee would be entitled to a hearing¹⁷² but the executive officer would assume

¹⁶⁷ Memorandum, *supra* note 113, at § 9956.

¹⁶⁸ *Eain v. Wilkes*, 641 F.2d at 514-15. Arguably, the State Department could withhold information if that were suitable to its foreign policy ends. However, Congress could impose a duty upon the State Department to provide the courts with information relevant to the political offense issue. It could further authorize the courts to subpoena such information, and provide that national security is no excuse to the subpoena, in view of the availability of *in camera* review for the inspection of politically sensitive information.

¹⁶⁹ *Id.* at 515.

¹⁷⁰ J. FRANK, *COURTS ON TRIAL*, 80-81 (1949).

¹⁷¹ "An adversary presentation seems the only effective means for combatting (the) natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known." Joint Conference on Professional Responsibility, Report, 44 A.B.A.J. 1159, 1160 (1958).

¹⁷² H.R. 3347, *supra* note 40, at § 3194(a); S. 220, *supra* note 40, at § 3194(a).

the position of both decisionmaker and prosecutor.¹⁷³ Inevitably, loss of impartiality results.

2. Foreign Policy Impact of Judicial Determinations of Political Offense Exceptions

Ultimately, any decision concerning extradition, whoever the decision-maker, will affect the conduct of our foreign policy. This is more so the case when the defendant has committed a particularly heinous crime or when the offense is political in nature. The defendant's alleged crime may have aroused public opinion in the requesting state, or the state may wish to punish the defendant as an example for others or to ensure that the availability of a haven will not encourage more crimes of that sort. The stronger the requesting state's desire to punish the accused, the more damaging the impact of a denial of its request.

With this in mind, critics of the present administration of the political offense exception have argued that the judiciary should not adjudicate the political offense exception.¹⁷⁴ It is true that the executive is endowed with the power to conduct foreign affairs.¹⁷⁵ However, courts have in the past made decisions which affect sensitive political issues.¹⁷⁶ Therefore, the courts should not abstain from a case simply because their decision may have political implications.¹⁷⁷

Judicial administration of the political offense exception can actually help American foreign policy. Several commentators have argued that the judicial administration of the political offense exception "permits the Ex-

¹⁷³ H.R. 3347, *supra* note 40, at § 3194(d)(2)(E) proposes the civil burden of preponderance of the evidence, while S. 220, *supra* note 40, at § 3194(e) proposes the clear and convincing evidence standard.

¹⁷⁴ Memorandum, *supra* note 113, at § 9956. This argument proves too much. As any extradition denial, whatever the ground relied upon, will foster ill will between the requesting and requested states, it is hard to understand why, under the critics' theory, the courts should be involved in extradition at all.

¹⁷⁵ The Supreme Court has described "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

¹⁷⁶ See *Youngstown v. Sawyer*, 343 U.S. 579 (1952) (restricting executive discretion to nationalize steel mills in time of war), and *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (permitting newspaper to publish the Pentagon Papers despite argument that publication undermines relations with allies).

¹⁷⁷ In *Baker v. Carr*, 369 U.S. 186 (1962) the court specifically addressed the question of the court's role in foreign affairs, saying: "(i)t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. The judicial abstention doctrine probably would not apply where, as here, Congress has authorized the courts to answer political questions. Typically that doctrine is applied in situations where judicial review would infringe upon executive or congressional power. Congressional authorization makes this issue moot.

ecutive branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations.¹⁷⁸

This, however, may be an overstatement. Typically, some states will differentiate between judicial and executive determinations and some states will not. Friendly nations know that the federal courts do not make official U.S. foreign policy. They are, therefore, unlikely to regard an extradition decision as a reversal of foreign policy. Yet, it is reasonable to assume that some nations will not make this distinction.

Even if it is conceded that judicial administration of the offense will have a damaging impact on the relations between the requesting and requested states, such damage will be minimal if the judiciary has correctly applied the legal test. The institution of the political offense exception presupposes a certain amount of conflict between the two states. Presumably by including a political offense exception in the treaty itself, the parties to the treaty envisioned situations when the requesting party's request for extradition would be denied on political offense grounds.

In the argument that the Secretary of State should decide the issue even when the judicial result is correct, it is implied that the Secretary of State would change what would otherwise be a correct result to accommodate the immediate interests of the requesting nation. The political offense exception should not be administered simply to accommodate the needs of the requesting state.

C. *Alternatives to the Present Administration of the Defense*

Various proposals have been made by Congress and commentators relating to the exclusion of terrorists and hijackers from the protection of the political offense exception and the elimination of judicial administration of the exception. Two such proposals have been set out below.¹⁷⁹

¹⁷⁸ Lubet & Czackes; *supra* note 54, at 200. See also Eain v. Wilkes, 641 F.2d at 513; SHEARER, *supra* note 3, at 192; Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L. J. 71, 74 (1978). The considerations underlying the Federal Sovereign Immunities Act (FSIA) lend support to the proposition that judicial determinations can often shield the executive from the adverse foreign policy consequences. The FSIA was motivated, in part, to deal with this problem. Before the FSIA, a person who wanted to sue a foreign government in a federal court had to first obtain the approval of the State Department. While generally foreign sovereigns are immune from private suit, under certain circumstances such a suit can be maintained. The State Department would determine whether these circumstances were present. Often political factors were considered. On occasion adverse foreign policy consequences would result. In response, Congress, through FSIA, provided for judicial determination of sovereign immunity questions. Congressional thinking was that judicial determinations would insulate the executive from reprisals of disaffected, deimmunized nations.

¹⁷⁹ A third proposal was offered by M. Cherif Bassiouni in a law review article. Bas-

While both have merit, neither are preferable to the current system.

1. The Senate and House Bills: The Exclusion Approach

The Senate and House are presently considering two bills which revise, in many respects, current extradition law. While both bills would retain judicial jurisdiction over the political offense exception, each has adopted an approach that would virtually abolish the exempt status of the relative political offense.

The proposed bills adopt an exclusion approach. Each would categorically exclude crimes involving certain disfavored elements from the protection of the political offense exception. The proposals provide that a political offense does not normally include aircraft hijackings,¹⁸⁰ offenses against internationally protected persons,¹⁸¹ offenses for which a treaty obligates the United States to extradite the accused,¹⁸² offenses involving the use of a firearm,¹⁸³ homicide, assault or kidnapping,¹⁸⁴ narcotics re-

siouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition—A Proposed Juridical Standard*, 19 DEPAUL L. REV. 217 (1969). Professor Bassiouni would remove the political offense defense from the decision making process of the nation-states involved and endow an international court with exclusive jurisdiction over the defense. Professor Bassiouni feels that the institution of international jurisdiction over the political offense exception would minimize the political tensions resulting from domestic administration of the exception. *Id.* at 257-258.

While the proposal has some merit, it is marred by practical defects inhering in international bodies. With the exception of commercial matters involving private parties, international tribunals are unable to enforce their decisions. Enforcement depends upon the cooperation of the parties involved. In the politicized atmosphere of an extradition proceeding, it is unlikely the requested state will comply with a political offense decision adverse to its interest. Furthermore, since international bodies are typically polarized along East-West lines, the requested state may tend to question the legitimacy of what it may call a politically tainted decision.

The defects in Professor Bassiouni's proposal tend to illuminate the benefits of wholly domestic adjudication of the political offense exception. While the success of an international tribunal depends upon the cooperation of states with disparate interests, decisions of domestic courts are binding on the executive.

¹⁸⁰ H.R. 6046, § 3194(e)(2)(A) (1982) and S. 220, *supra* note 40 at § 3194(e)(1)(A). [Ed. note: The House Version now pending, H.R. 3347, *supra* note 40, has no comparable provision.]

¹⁸¹ H.R. 3347, *supra* note 40, at § 3194(e)(2)(A) and S. 220, *supra* note 40, at § 3194(e)(2)(C).

¹⁸² H.R. 3347, *supra* note 40, at § 3194(e)(2)(B) and S. 220 *supra* note 40, at § 3194(e)(2)(D).

¹⁸³ H.R. 6046, § 3194(e)(2)(F) (1982) and S. 220, *supra* note 40, at § 3194(e)(2)(B). [Ed. note: The House version now pending, H.R. 3347 *supra* note 40, has no comparable provision.]

¹⁸⁴ H.R. 6046, § 3194(e)(2)(E) (1982) and S. 220, *supra* note 40, at § 3194(e)(2)(A). [Ed. note: The House version now pending, H.R. 3347, *supra* note 40, has no comparable provision.]

lated offenses,¹⁸⁵ or conspiracy to commit any of the above offenses.¹⁸⁶ While the House Bill allows the fugitive to show that an offense within the excluded categories should be included because of the extraordinary circumstances in which it was committed,¹⁸⁷ the Senate Bill would do so only with respect to crimes involving homicide, assault or kidnapping, or the use of a firearm or the conspiracy to commit any of those crimes.¹⁸⁸

The proposed bills retain many of the advantages of judicial administration of the defense, while eliminating the disadvantages associated with executive determination. It removes terrorists from the protection of the political offense exception without leaving the decision to the dictates of diplomatic expedience¹⁸⁹ and without subjecting the executive to possible criticism by disgruntled requesting states.¹⁹⁰ The proposals, however, are overbroad; while acts of terrorism should be put beyond the protections of the political offense exception, the bill is not narrowly drafted for that purpose.

The adoption of either proposal would remove the relative political offense from American extradition law. The blanket exclusion of all violent acts from the protection of the political offense exception will guarantee the extradition of terrorists at the expense of genuine political opponents who resort to military tactics to meet their goals. This is at odds with the Western notion of the right to rebel against oppression.¹⁹¹ Given the frequency and seriousness of political repression throughout the world,¹⁹² it may be inappropriate for a democratic society to automatically regard all violent political acts as common crimes subject to extradition.

The historical justifications for the relative political offense exception are still valid today. Individuals whose offenses are neither aimed at indiscriminate targets nor disproportionate to their political goals pose no threat to our government or social order.¹⁹³ The philosophical and ideological justifications underlying the defense are no less compelling today than they were at the inception of the political offense exception. Many

¹⁸⁵ S. 220, *supra* note 40, at § 3194(e)(1)(E) and H.R. 3347, *supra* note 40, at § 3194(e)(2)(C).

¹⁸⁶ H.R. 3347, *supra* note 40, at § 3194(e)(2)(F) and S. 220, *supra* note 40, at § 3194(e)(1)(G).

¹⁸⁷ H.R. 3347, *supra* note 40, at § 3194(e)(2).

¹⁸⁸ S. 220, *supra* note 40, and § 3194(e)(2)(A-C).

¹⁸⁹ See *supra* notes 131-155 and accompanying text.

¹⁹⁰ See *supra* note 178.

¹⁹¹ See *supra* note 10 and accompanying text.

¹⁹² Report submitted to the COMM. ON FOR. REL., U.S. SENATE AND THE COMM. ON FOR. AFF., U.S. HOUSE OF REPRESENTATIVES BY THE SECRETARY OF STATE, 97th Cong., 1st Sess., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *passim*. (Joint Comm. Print 1981).

¹⁹³ I. SHEARER, *supra* note 3, at 188; see also Garcia-Mora, *Present Status*, *supra* note 5, at 389.

of the world's inhabitants resort to violence in pursuit of freedom and justice; yet, free societies remain reluctant parties to their punishment.¹⁹⁴ Humanitarian concerns for the extradition of political offenders persist, especially given the widespread use of torture in other nations.¹⁹⁵

To maintain that violence is *ipso facto* not political is idealistic and illusory.¹⁹⁶ Violence permeates politics of all kinds. Governments rely on the tacit threat and coercive force of violence in the form of armed forces and police.¹⁹⁷ Political dissidents often resort to violence when provoked by a violently repressive state.¹⁹⁸ States are often founded through violence, and later extend and defend their interests and influence by violence.¹⁹⁹ It is absurd to maintain that violent offenses cannot be political.

In conclusion, while the House and Senate proposals would fulfill the purpose of preventing terrorists from escaping justice under the cloak of the political offense exception, they would do so by destroying the relative political offense²⁰⁰ and increasing the chances that genuine political dissidents will be extradited to face political persecution at the hands of the requesting state.

2. Judicially Reviewable Executive Decisions

Theoretically, vesting the executive with judicially reviewable authority to administer the political offense exception would combine the benefits of both executive and judicial determinations while allowing the values underlying each some weight.

¹⁹⁴ A state "whose people have attained political liberty" is thought to have no interest in protecting from "the advances of its own people" a foreign government that denies them the most basic human rights. PROCEEDINGS, *supra* 9, at 160.

¹⁹⁵ AMNESTY INTERNATIONAL REPORT, *passim*.

¹⁹⁶ "Political power grows out of the barrel of a gun," Mao Tse-Tung, in QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 61 (2d Vest Pocket Ed. 1972).

¹⁹⁷ FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78-79 (H. Gerth & C. Mills eds. 1958).

¹⁹⁸ Garcia-Mora, *supra* note 5, at 385.

¹⁹⁹ They do so through war.

²⁰⁰ There are two additional defects in the proposal. First, it makes attempt and conspiracy common crimes. § 3194(e)(2)(B)(vii). These crimes tend to be vague and difficult to prove. Thus, they would easily lend themselves to fabrication by the requesting state.

Second, § 3194(e)(2)(A) (iii), states that unlawful political advocacy, not advocating and inciting violence, will normally be a political offense. By the maxim of statutory construction, *expressio unius est exclusio alterius*, this section impliedly makes advocacy which condones or incites violence *ipso facto* a common offense. (As the maxim is applied to statutory interpretation, where a form of "conduct . . . (is) designated, there is an inference that all omissions should be understood as exclusions." 2 J. SUTHERLAND, STATUTORY CONSTRUCTION 123 (C.D. Sands ed. 1973)). Such a rigid classification is also susceptible of fabrication by the requesting state. The doctrine of dangerous speech has been problematic in American law; it would surely lend itself to abuse in the hands of an authoritarian requesting state anxious to crack down on its opposition.

Executive determination, in the first instance, gives recognition to the national interest as a cognizable ingredient in the political offense decision²⁰¹ and takes advantage of the executive's more sophisticated appreciation of the political situation in the requesting country.²⁰² At the same time, the availability of judicial review assures that the non-national interest concerns underlying the exception are not ignored.²⁰³ It also affords the extraditee recourse in the event of an arbitrary executive determination.

The essential difficulty with the proposed system is the formation of a workable standard of review. One of the supposed advantages of the proposal is that judicial review assures that all values underlying the political offense decision are considered. However, when the executive makes his decision on the basis of national interest, to the exclusion of other underlying values, the judiciary can give effect to the other values only if it overturns the executive decision. Since reversal is necessary, both sets of values cannot be given effect simultaneously, unless the results dictated by each happen to coincide.

The judiciary could conceivably construct a standard by which national interest concerns are balanced against non-national interest concerns and effect is given to those concerns which are more weighty in the particular case. For example, such a standard could protect national interest concerns when they are compelling. The essential difficulty with this standard is that the courts in judging the seriousness of the national interest may be usurping the executive's power to determine national interest in the area of foreign affairs.

The present system avoids this difficulty. While the courts do in some instances evaluate the national interest,²⁰⁴ they typically give great weight to executive testimony on the importance of the national interest.²⁰⁵ Further, since the judiciary under the present system makes the determination in the first instance, it is not compelled to evaluate the propriety of an executive determination relating to an area which the Constitution grants primary competence to the executive.²⁰⁶ The present system provides for essentially the same benefits as the judicial review of executive decision proposal. As we have seen the courts give effect to seri-

²⁰¹ For discussion of national interest concerns underlying the political offense exception *see supra* notes 122-32 and accompanying text.

²⁰² *See supra* note 161 and accompanying text.

²⁰³ For delineation of non-national interest concerns underlying the political offense exception *see supra* note 119 and accompanying text.

²⁰⁴ *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957).

²⁰⁵ *Eain v. Wilkes*, 641 F.2d 504, 515 (7th Cir. 1981). The court said that State Department testimony is given great, if not controlling, weight. However, the courts will sometimes ignore that testimony where individual liberties were at stake.

²⁰⁶ *See* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 45-49 (1972).

ous national interests while allowing other values precedence where national interest concerns are not serious.²⁰⁷ Furthermore, judicial determination allows for consideration of executive testimony which in some circumstances provides the confidential information necessary to an informed decision.²⁰⁸ *In camera* review has been used for this purpose.²⁰⁹ The present system, having many of the benefits of the executive decision-judicial review proposal and none of the deficiencies, is thus preferable.

IV. CONCLUSION

If the political offense doctrine is a discretionary concept whose applicability depends upon the immediate political needs of the requested country, then it must be determined what political needs should be taken into account. When Congress first enacted our extradition law such determinations were not relevant. It was believed that an even-handed, principled application of the doctrine by an organ of government suited for such purposes was itself in the national interest.

Since that time, the administration of the political offense exception has become more complicated. The use of terrorism to meet political goals has pushed the concept to its limit. A principled application of the doctrine, as it now stands, would require us to offer sanctuary to individuals whose means we strongly disagree with. The advent of a world community whose members share a strong sense of interdependence has brought into question the validity of the political offense doctrine itself.

In this setting, the propriety of judicial administration of the defense, unquestioned for over 100 years, has been drawn sharply in dispute. Recent cases in which the courts have withheld political offenders from close U.S. allies have induced criticism of the courts' ability to administer the defense.

The political offense doctrine is not a unitary concept. It represents the amalgamation of three or four different policies. More is at play than immediate foreign policy concerns, although these concerns should surely be considered. Over the years, the courts have made the doctrine into a discretionary concept in recognition of the diversity of policy concerns underlying the defense. Although the courts have shown a propensity to ignore the defense where a serious foreign policy need is shown, absent this need the courts have faithfully applied the defense, giving effect to

²⁰⁷ See *supra* notes 150-60 and accompanying text.

²⁰⁸ *Eain v. Wilkes*, 641 F.2d at 515.

²⁰⁹ See *United States v. Sampol*, 636 F.2d 621, 681-82 (D.C. Cir. 1980). (*in camera* review used to review politically sensitive government evidence); see also *Eain v. Wilkes*, 641 F.2d at 515.

the other objectives underlying the doctrine.

Having the executive exclusively determine the political offense exception would destroy this balance. Non-national interests would be ignored in a purely executive administration of the defense. The executive decision would be based on the expedience of the moment.

The authors propose that the courts are the appropriate forum for the administration of the political offense exception. At the same time we recognize that international events and practices might enable terrorists to avoid extradition under the cloak of the political offense exception. While the courts should retain jurisdiction over the political offense exception, the underlying legal test should be narrowed. The authors, thus, submit that the Congress specifically exclude terrorist acts from the protection of the political offense exception.

Although there is no universally accepted definition of terrorism,²¹⁰ Congress could draft a definition containing the following central elements. Terrorism would include individual or collective coercive violence directed at a protected target, such as innocent civilians,²¹¹ diplomats or civil aviation, whose aim is to change or preserve the structures or policies of a given state or territory.²¹² This definition guarantees that mere politi-

²¹⁰ B. CLINE, FORWARD TO CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS (Y. Alexander, M. Browne & A. Nanes eds. 1979). The concept of terrorism is linguistically ambiguous and therefore susceptible to political manipulation. Bonante, *supra* note 126, at 197-98. First, the word "terrorism" tends to exclude state terrorism. *Id.* at 199. The usage of "terrorism" has also been expanded to describe any revolutionary force that resorts to violence, regardless of its targets and tactics.

²¹¹ For a discussion of the political and moral implications of legal distinctions regarding innocence and the targets of political violence, see Paust, "Non-Protected" Persons or Things, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 341, 343-345 (A. Evans & J. Murphy eds. 1978).

²¹² This definition is adopted from that proposed by the 1973 Conference on Terrorism and Political Crimes sponsored by the International Institute of Higher Studies in Criminal Sciences, at Siracusa, Italy:

Individual or collective coercive conduct employing strategies of terror violence which contain an international element or are directed against an internationally protected target and whose aim is to produce a power-oriented outcome. Such conduct contains an international element when:

- 1) the perpetrator and victim are citizens of different states or
- 2) the conduct is performed in whole or in part in more than one state.

Internationally protected targets are:

- 1) innocent civilians;
- 2) duly accredited diplomats and personnel of international organizations acting within the scope of their functions;
- 3) international civil aviation;
- 4) the mail and other means of international communications; and
- 5) members of nonbelligerent armed forces.

A power oriented outcome is: an outcome which is aimed at changing or preserving the political, social or economic structures or policies of a given state or terri-

cal motivation will not prevent an act from being terrorist. Furthermore, the definition distinguishes between terrorist acts directed against indiscriminate targets and legitimate political violence directed against specific political and military targets.²¹³

If faithfully and universally applied, this test would deprive terrorists of the protective cloak of the political offense exception. Under such legislation, when an extraditee raises the political offense issue, the court would scrutinize the act to determine whether it was terrorist. If the *Eain* case were decided under this test, extradition would have automatically resulted since the target of the offense was innocent civilians. In *McMullen* and *Mackin*, the targets were military targets intimately connected with a protracted military conflict. They would not fall within the protected category and, therefore, the offenses would not be deemed terrorist.²¹⁴ In such cases, the court would then apply the common law political incidence test to determine whether the offense was political rather than personal or common.

This proposal preserves the benefits of judicial characterization of the offense while narrowing the exception to exclude terrorists. Courts would continue to administer the defense on a case-by-case basis, weighing all the competing interests at stake. The actual nature of the offense would remain the paramount consideration. The proposal would virtually guarantee the extradition of terrorists without exposing legitimate political offenders to persecution.

Judicial application of a terrorist test would narrow the political incidence test and thereby eliminate most of the problems associated with

tory by means of coercive strategies.

Final Document, CONFERENCE ON TERRORISM AND POLITICAL CRIMES, 30, SYRACUSE SICILY, 1973, INTERNATIONAL TERRORISM AND POLITICAL CRIMES xiv (M.C. Bassiouni ed. 1975).

²¹³ The Final Document of the 1973 Conference on Terrorism and Political Crimes concluded that "(we) must . . . distinguish between legitimate rebellion and indiscriminate terror tactics. The resort to violence by individuals or groups engaging in wars of national liberation is lawful when it remains within the confines of international law which recognizes such activity. It is when acts of violence are committed indiscriminately, disproportionately and contain an international element or are against internationally protected targets that such acts become terrorism." *Id.* at xii.

²¹⁴ Such a legal distinction, though perhaps callous, is consistent with the law of war. The relevant aspects of the law of war may be briefly summarized by the following propositions:

Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy.

Belligerents will leave non-combatants outside the area of operations and will refrain from attacking them deliberately.

Attacks are legitimate when directed against military objectives, that is to say whose total or partial destruction would constitute a definite military advantage.

E. BOND, THE RULES OF RIOT 76-77 (1974).

the current administration of the defense. It would do so, however, without impairing consideration of all the values underlying the political offense exception and extradition in general.